United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

75-7278

ORIGINAL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- X

REBECCA REYHER and RUTH GANNETT,

Appellants,

v.

CHILDREN'S TELEVISION WORKSHOP and TUESDAY PUBLICATIONS, INC.,

Appellees.

- X

On Appeal from the United States District Court for the Southern District of New York

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PETITION FOR REHEARING

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TABLE OF CASES

STATUTE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- X

REBECCA REYHER and RUTH GANNETT, :

Appellants, :

v. :

CHILDREN'S TELEVISION WORKSHOP and TUESDAY PUBLICATIONS, INC., :

Appellees. :

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PETITION FOR REHEARING

Appellants Rebecca Reyher and Ruth Gannett petition this Court for rehearing of the case decided on April 5, 1976, on the following grounds:

1. Appellants have been denied their effective right to appeal since this Court has ruled against them, after briefs and argument, on grounds not briefed by either party.

2. This Court has rejected the mandate of F.R.C.P. 52 (a) by entering a fact finding de novo, and in so doing, since all the facts were not before it, the Court has gone beyond its granted authority.

I

In deciding the case, this Court has adopted as a matter of law appellants' grounds for reversal of the court

below on the legal issues decided there; that is, this Court has found plaintiffs' work was not derivative under the copyright law. Yet this Court has managed to affirm the ruling of the court below by making new findings of fact that contradict the findings of fact by the court below.

This Court affirmed the court below

> "on the grounds that there was no substantial similarity between the works as to copyrightable material" (Slip Opinion, 3032).

This Court did not have all the facts before it. It did not view the film strips and the motion picture of appellees which was part of the evidence. It did not hear the testimony of the witnesses.

The very fact that issues found otherwise by this Court were before the court below on extensive pretrial and post-trial briefs along with film strips and a motion picture is persuasive of the error of this Court in coming to a different conclusion in the absence of either the evidence or the briefs. After viewing the visual exhibits and hearing the witnesses' testimony and considering all the facts, the court below concluded that the facts support appellants' contention of copyright infringement, viz.:

> "It is clear to this Court, <u>having viewed the relevant 'Sesame Street' segment</u> and read the three magazine articles involved, that there is a substantial similarity between plaintiffs' copyrighted book and defendants' allegedly infringing works. Although the

> only phrase which appears in both works is 'Once upon a time, long, long ago,' and although there is little, if any, actual paraphrasing of plaintiffs' book in defendants' works, no individual comparing the works at bar could help but conclude that they are substantially similar. While defendants' rendition of the story takes place in a different locale and is told with fewer frills than plaintiffs', both stories present an identical sequence of events." (A-7) (Emphasis supplied)

This Court further omits from its opinion any mention of the copyright date of plaintiffs' work. That date was 1945. It follows that, unless the trial record showed defendants' witnesses citing some other source for recollections of encounter with plaintiffs' story during the period from 1945 to 1970 (the date of defendants' plagiary) it must be presumed that such recollections derive from an unknown or forgotten encounter with plaintiffs' work. Nonetheless, this Court cites, as evidence for the existencee of other sources, inter alia the testimony of defendants' agent Jon Stone who said, without more, that he heard the story told 20 years ago (i.e. 1950-1955) to his younger sister. That was 5 to 10 years after publication of Mrs. Reyher's copyrighted story; so it must be presumed that the teller of the tale derived same from the Reyher publication -- the only source extant. Since this Court found the Reyher publication not derivative, it should have held, on the evidence before it, that other versions of the story derived from the Reyher publication.

II

F.R.C.P. 52(a) provides in part that "[f]indings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses."

This Court has in effect disregarded the mandate of Rule 52 (a) in its decision in this case, and has arbitrarily substituted its own view of the facts -- not even considering the whole record of the District Court on which its new purported finding against the similarity of the two works is based. This is contrary to the mandate of the United States Supreme Court in Zenith Corp. v. Hazeltine, 395 U.S. 100, 123 (1969); cf. United States v. Gypsum Co., 333 U.S. 364, 395 (1948). In finding against the similarity of the two works, this Court has not given the deference to the fact-finding of Judge Cannella which was due the District Court. In so doing this Court further has disregarded its own rule limiting the scope of its review. See Chris Craft Industries v. Piper Aircraft Corp., 480 F.2d 341, 393 (2 Cir. 1974); Silver Chrysler Plymouth Inc. v. Chrysler Motor Corp., 518 F.2d 751, 758 (2 Cir. 1975); Coalition for Ed. in Dist. 1 v. Board of Elec. City of N.Y., 495 F.2d 1090 (2 Cir. 1974); cf. Moore v. Townsend, 525 F.2d 482, 485 (10 Cir. 1975); American Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230, 1242 (10 Cir. 1975).

CONCLUSION

For all the reasons set forth above, this Court should grant appellants a rehearing.

Respectfully submitted,

ELEANOR JACKSON PIEL
Attorney for Appellants

April 19, 1976.

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April 19, 1976

Hon. A. Daniel Fusaro
Clerk United States Court of Appeals
Second Circuit
United States Courthouse
Foley Square, N. Y., N.Y. 10007

Reyher v. Children's Television Workshop

Dear Mr. Fusaro:

Please transmit my request to the Chief Judge pursuant to Rule 35, F.R.A.P. for a hearing en banc on the issues raised on the request for a rehearing filed pursuant to Rule 40 F.R.A.P.

The issues in this case are of particular importance to the copyright bar and to authors throughout the country. If the decision of this Court is permitted to stand an author's copyright protection is seriously jeopardized. The facts as found by the court below were that the defendants' work was similar to plaintiffs' copyrighted story. This Court has summarily reversed that fact finding even though the issues as to similarity were never briefed in this Court. In so doing this Court has disregarded the mandate of Federal Rule 52(a), as well as denied appellants their right to brief the issues to be decided by the Court.

The appearance of the Writers Guild of America as Amicus Curiae on behalf of appellants underlines the importance for reconsideration of the issues raised in the request for rehearing.

Sincerely yours,

Eleanor Jackson Piel

ELEANOR JACKSON PIEL

EJP:gc
cc: Coudert Bros.

2 Copies Received

Date April 19, 1976

Firm Cobaltt Brothers, Esqs.

By Paul B. [illegible]